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IN THE

Supreme Court of the United States

TERM, 1945

No. 355

ERNEST E. SCARBOROUGH,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION AND BRIEF OF THE UNITED RAILROAD WORKERS OF AMERICA, C.I.O., FOR LEAVE TO FILE THE SAME, AMICUS CURIAE.

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FRANK DONNER
Counsel for United Railroad Workers of America.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Ernest E. Scarborough, by his attorneys, has prayed that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on May 24, 1945. The United Railroad Workers of America, C.I.O., ask leave to file a brief, amicus curiae, because of the severe precedent this decision may have on cases hereinafter to be tried, affecting the rights of millions of other non-operating railroad employees similarly situated.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported.

The opinion of the United States Circuit Court of Appeals (R. 67) is reported in 149 Fed. 2d, 636.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 24, 1945 (R. 67). The jurisdiction of this Court is involved under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C.A., Sec. 347 (a).

QUESTIONS PRESENTED

1. Did the ruling of the Court below, holding there was no evidence of actionable negligence, as a matter of law, deprive the petitioner of his constitutional right to a trial by jury?

2. Was the action of the Court below erroneously predicated on an application of the principles of assumption of risk no longer available as a defense in these cases?

CONSTITUTION AND STATUTE INVOLVED

The Seventh Amendment to the Constitution of the United States which in its pertinent parts provides:

> "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers Liability Act as amended (45 U.S.C. 51) which provides in part:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE FACTS

The petitioner who had no duty to supply his own tools, nor to specify what tools were needed, arrived at Bryn Mawr Station on April 21, 1941, with several other employees, with

directions to remove the old wiring and lighting fixtures and to replace the same. A specific order required that the beam and other surface parts on or near the roof, to which new material was to be affixed, were to be cleaned carefully and freed of all rust.

Actually, neither the usual nor any rust cleaning tools were provided by the petitioner's superiors. The petitioner was not the foreman on the job. As gang leader he found an old broom and some waste with which he and his co-workers cleaned fixtures I and II. *The petitioner had nothing whatsoever to do with cleaning the beam around fixture III.* His co-workers *alone* undertook to remove the rust around it.

By the slightest application by the petitioner of pressure on the cover of that receptacle box, he was showered by rust around that light, supposedly previously cleaned by his fellow employees, but actually not cleaned at all. This rust caused the petitioner to lose all vision in one eye.

The petitioner contends that this accident occurred because—

(a) he and his fellow employees were not supplied with the usual proper rust-removing tools, or

(b) if what was used was adequate, there was evidence of improper rust removal by his fellow employees.

SPECIFICATIONS OF ERROR TO BE URGED

1. The right to a jury trial was typically emasculated by the ruling in this case.

2. The decision of the Court below is in direct conflict with the statute as interpreted by the recent cases of *Blair* v. *B. & O. R. R. Co.*, 323 U. S. 600; *Bailey, Admnx.* v. *Central of Vermont*, 319 U. S. 350; *Tennant* v. *Peoria & P. V. Ry. Co.*, 321 U. S. 29.

3. This decision vitally affects the rights of over sixty-five thousand *non-operating* railroad employees of this defendant alone, as well as several millions similarly situated with the other interstate carriers in the country. The Amendment of 1939 has drawn shopmen, carmen, machinists, moulders, electricians, plasterers, and workers of dozens of other crafts into

its purview since their work is sometimes of an interstate nature. The comment of the trial court (the only judicial expression indicating the rationale of the ruling) indicates that the ruling of this Court in *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, removing every last vestige of assumption of risk as defense in whatever form it might be presented, has been ignored or misinterpreted. This decision, depriving this non-operating employee of all recovery, will serve as a devastating blow to this class of workers, especially since the Third Circuit is in Philadelphia, the home of the defendant and the trial forum for the great majority of these claims brought by members of this labor organization.

CONCLUSION

The writ should be granted.

Respectfully submitted,

LEE PRESSMAN
FRANK DONNER
Counsel for United Railroad Workers of America, C.I.O.

BRIEF

This brief has been prepared, not merely because of the injustice believed done the petitioner, but because the decision may become an insurmountable obstacle to recovery by thousands of injured non-operating employees who will have to rely on proof of negligence of the same kind and character as here offered by the petitioner.

Makeshift tools ill fit for performance of the work directed, practices hazardous of themselves without necessity, structures and appliances so arranged as to create unreasonable peril, and operations without adequate regulation by safety rules that the railroad itself should have promulgated; all give rise to a terrible accident toll that brings unnecessary suffering to thousands of railroad families.

Whether these various factual situations constitute negligence should be for exclusive jury consideration in the light of the applicable legal principles enunciated in the several cases

decided by this Court since the first *Tiller* case. (*Tiller* v. *Atlantic Coast Line*, 318 U. S. 54.)

Necessarily here negligence takes on a more sophisticated guise. A positive act of commission is naturally more easily recognized than a complex passive state of affairs wherein the act is one of omission. Though the decision in the latter case is more difficult, nevertheless, it is still a decision as to a factual situation. As such it is for the jury. Railroad employees must not be deprived of their right to a trial by jury merely because a judge thinks he could more easily decide the case, or even more correctly. To do so is to have judicial usurpation of the jury function. *Bailey* v. *Central of Vermont Rwy. Co.*, 319 U. S. 350.

Judicial conduct to the contrary is, however, frequently based on the thought that since the employer need not furnish the most efficient, the safest or best appliance (*Chicago & N. W. R. R. Co.* v. *Bowers*, 241 U. S. 470), but merely one reasonably safe, whether the appliance supplied or the procedure followed is reasonably safe, becomes a question of law and not fact.

Proof that other railroads use the same tool or follow the same practices, as those complained of, in some judicial minds, as in the Court below, seems to be adequate proof of the absence of negligence warranting a ruling to that effect as a matter of law.

In effect, this all means that since the injured employee is as aware as the railroad of the hazard and peril, he has assumed that risk by accepting the job or using the tool in question, or doing the work without such tools as should properly have been supplied.

Such courts, however, do not call it assumption of risk. They call it "non-negligence". This practice was decried in the *Tiller* case, *supra*. As was pointed out in that case, the Court said,

> "In the disposition of cases the question of the plaintiff's assumption of risk has frequently been treated simply as another way of appraising defendant's negligence, as was done by the court below in the instant case.

"It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. The result is an act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed."

In the same opinion, in note 21, the Court said:

"The present rule apparently ignores the fact that the master, and not the servant, has control of the conditions which affect the safety of the employees. . . . The existing rule not only permits the employer to be careless about the condition of his premises, but, in effect, places a premium upon his carelessness. . . .

"Under present economic conditions employees must, of necessity, continue to work under unsafe conditions or frequently sacrifice the fruits of many years of accumulated seniority, go on relief, or beg their bread."

In the 1939 Senate Committee Report to this amendment we find,

"In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances."

Illustrative of typical accidents in which non-operating employees sustain injury are the following three:

A. A roundhouse employee in replacing a casing head, weighing eighty pounds, on an engine cylinder does a job assigned to a single machinist. He must lift it 2½ ft. high and set it on a protusion 4 in. long and 2 ft. away from the platform he works on. The casing head has no handle or grip by which it may be held. The practice is universal in all railroads.

QUERY: Where an employee thereby suffers an inguinal hernia, is it for the jury to decide whether the employee was required to do more than should have been reasonably expected of one man?

B. A stower who loads freight cars at night is directed to hammer nails into car door jambs on which to hang electric cord. He necessarily hammers in the dark, misses the nail, and it causes loss of an eye. The procedure is universal on railroads. Simple, permanent, three-cent line hooks could have been installed, obviating just such peril.

QUERY: Is this practice so hazardous, though employee is aware of it, that a jury might find in it actionable negligence?

C. The universal practice on electrified railroads is to reinstate power immediately on catenary lines that have been short circuited because of a foreign object touching the trolley overhead line or a defect in some equipment, without investigating the cause of the power outage. In only four out of two thousand cases are humans involved.

QUERY: Is it a judicial or a jury's function to weigh this conduct for negligence, despite its universal practice?

The record at hand indicates an order to clean overhead work of rust without providing *any* of the usual tools for such work. *Clearly anticipatable* by the employer was the fact that some employee would work below that point and apply pressure there, relying on the rust having been previously removed so that he would not be subjected to the risk of a shower of rust coming onto his face.

This certainly presented a jury issue under the decision in *Blair* v. *B. & O. R. R. Co.*, 323 U. S. 600. Intertwined with this factual situation is the otherwise inevitable conclusion that, if the waste found and used by the fellow employees to clean the fixture in question was adequate to clean it properly, then such fellow employees were negligent in their work and proximately caused the injury. *Union Pacific R. R. Co.* v. *Hadley*, 246 U. S. 330.

To deprive the petitioner of a jury trial in the instant case necessarily precludes jury trials in the thousands of cases comparable to those illustrated.

To do so is to put these people back into the dark economic ages where injured employees and families of fatally injured employees were left destitute and economic charges on the

community instead of placing the burden of their care on the industry responsible for their plight.

The petition for certiorari, it is respectfully submitted, should be granted and the case remanded for trial to a jury.

Respectfully submitted,

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